

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD CLAYTON STURGIS,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2014

No. 314821

Oakland Circuit Court

LC No. 2012-240961-FH

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Donald Clayton Sturgis appeals as of right his jury trial conviction of unlawful posting of messages through an electronic medium in violation of a restraining order,<sup>1</sup> two counts of using a computer to commit a felony,<sup>2</sup> aggravated stalking,<sup>3</sup> and misdemeanor stalking.<sup>4</sup> The trial court sentenced Sturgis as a fourth habitual offender<sup>5</sup> to concurrent prison terms of 5 to 35 years each for the unlawful posting, using a computer to commit a felony, and aggravated stalking convictions, and one year for the misdemeanor stalking conviction. We affirm.

I. CLAIM OF INSTRUCTIONAL ERROR

Sturgis argues that the trial court erred by denying his request for a jury instruction regarding his First Amendment right to freedom of expression, and contends that this error also implicated his constitutional right to present a defense. We disagree. A trial court's determination regarding whether a jury instruction applies to the facts of a case is reviewed for an abuse of discretion.<sup>6</sup> Questions of law involving jury instructions are reviewed de novo.<sup>7</sup>

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<sup>1</sup> MCL 750.411s(2)(b)(i).

<sup>2</sup> MCL 752.796(1); MCL 752.797(3)(d).

<sup>3</sup> MCL 750.411i.

<sup>4</sup> MCL 750.411h.

<sup>5</sup> MCL 769.12.

<sup>6</sup> *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Jury instructions are examined as a whole to determine whether error requiring reversal occurred.<sup>8</sup> There is no error if the instructions fairly present the issues to the jury and sufficiently protect the defendant's rights.<sup>9</sup>

Sturgis was charged with misdemeanor stalking.<sup>10</sup> The statute defines "stalking" as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."<sup>11</sup> "Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose."<sup>12</sup>

Sturgis was also charged with aggravated stalking, which elevates the offense of stalking to a felony where "[a]t least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction."<sup>13</sup> The aggravated stalking statute contains the same definitions of "stalking" and "harassment" as contained in the misdemeanor stalking statute.<sup>14</sup>

Sturgis was further charged with illegally posting a message "through the use of any medium of communication, including the internet or a computer . . . without the victim's consent" when:

(b) Posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.<sup>[15]</sup>

The statute prescribes an enhanced penalty if the posting "is in violation of a restraining order and the person has received actual notice of that restraining order or posting the message is in violation of an injunction or preliminary injunction."<sup>16</sup> The unlawful posting statute specifically provides that it "does not prohibit constitutionally protected speech or activity."<sup>17</sup> It is clear from

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<sup>7</sup> *Id.*

<sup>8</sup> *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

<sup>9</sup> *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007).

<sup>10</sup> MCL 750.411h.

<sup>11</sup> MCL 750.411h(1)(d).

<sup>12</sup> MCL 750.411h(1)(c).

<sup>13</sup> MCL 750.411i(2)(a).

<sup>14</sup> See MCL 750.411i(1)(d) and (e).

<sup>15</sup> MCL 750.411s(1).

<sup>16</sup> MCL 750.411s(2)(b)(i).

<sup>17</sup> MCL 750.411s(6).

the above statutes that constitutionally protected speech or activity cannot support a conviction for stalking, aggravated stalking, or unlawful posting of a message.

Sturgis was also charged with two counts of using a computer to commit a felony, the statute for which provides that “[a] person shall not use a . . . computer . . . to commit, attempt to commit . . . a crime.”<sup>18</sup> The two charges under that statute were premised on Sturgis’s use of a computer to commit unlawful posting of a message in violation of a restraining order and his use of a computer to commit aggravated stalking. Because the latter two offenses cannot be premised on constitutionally protected speech or activity, it follows that Sturgis could not be convicted of the two counts of using a computer to commit a crime to the extent that the speech or activity forming the basis of the underlying charges can be considered constitutionally protected. Given these considerations, which are supported by the applicable case law, Sturgis’s argument that he was entitled to an instruction advising the jury of his First Amendment right to freedom of expression must fail.<sup>19</sup>

Although Sturgis could not be convicted on the basis of constitutionally protected speech or activity, we disagree with Sturgis’s argument that the trial court violated his right to present a defense by denying his request for a jury instruction regarding his First Amendment right of expression and by not allowing him to argue to the jury that his conduct was constitutionally protected. The case law is clear that not all expressive conduct is constitutionally protected.<sup>20</sup> The United States Supreme Court has held:

When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. . . . The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case.<sup>[21]</sup>

In the present case, the trial court correctly determined that constitutional protection of Sturgis’s conduct was a question of law for the court, not a question of fact for the jury. The court instructed the jury on the elements of the charged offenses. Those elements, if proven beyond a reasonable doubt, would establish as a matter of law that Sturgis’s conduct was not constitutionally protected. Accordingly, the trial court did not err by denying Sturgis’s request for a jury instruction regarding his First Amendment right to freedom of expression, and the refusal to provide the instruction did not prejudice his right to present a defense.

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<sup>18</sup> MCL 752.796(1).

<sup>19</sup> See *People v White*, 212 Mich App 298, 310-311; 536 NW2d 876 (1995); *Burns v Detroit (On Remand)*, 253 Mich App 608, 611, 613, 621-622; 660 NW2d 85 (2002), mod 468 Mich 881 (2003).

<sup>20</sup> See *Burns*, 253 Mich App at 611, 613, 621-622; *White*, 212 Mich App at 310-311.

<sup>21</sup> *Dennis v United States*, 341 US 494, 513; 71 S Ct 857; 95 L Ed 1137 (1951).

## II. SCORING OF OFFENSE VARIABLE 19

Sturgis next argues that the trial court erred in assessing 10 points for offense variable (OV) 19 of the sentencing guidelines. We disagree. Appellate review of the circuit court's factual determinations regarding the sentencing guidelines "are reviewed for clear error and must be supported by a preponderance of the evidence."<sup>22</sup> However, "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute . . . is a question of statutory interpretation," which we review de novo.<sup>23</sup>

OV 19 "is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services."<sup>24</sup> OV 19 is scored at 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice."<sup>25</sup> Interference with the administration of justice is not limited to obstruction of justice or to acts that rise to the level of a chargeable offense, and the statute encompasses more than just the actual judicial process.<sup>26</sup>

The trial court determined that 10 points for OV 19 was appropriate because Sturgis evaded service of the personal protection order (PPO), violated the prior probation order by transferring the photos of the victim from the hard drive of his computer to a thumb drive, and sent offending faxes regarding the victim to two judges in the community where the victim practiced law in an attempt to influence the judges against her. While there was conflicting testimony regarding the circumstances under which Sturgis received notice of the PPO, the trial court's remaining reasons for scoring 10 points for OV 19 are supported by the record. Thus, there was no error by the trial court.

## III. STANDARD-4 BRIEF

Sturgis raises additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. None of these issues have merit.

### A. SUFFICIENCY OF THE EVIDENCE

Sturgis challenges the sufficiency of the evidence in support of his convictions. When reviewing a claim of insufficient evidence, this Court reviews the record de novo.<sup>27</sup> We must review "the evidence in a light most favorable to the prosecutor to determine whether any trier of

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<sup>22</sup> *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

<sup>23</sup> *Id.*

<sup>24</sup> MCL 777.49.

<sup>25</sup> MCL 777.49(c).

<sup>26</sup> *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004).

<sup>27</sup> *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

fact could find the essential elements of the crime were proven beyond a reasonable doubt.”<sup>28</sup> “[C]onflicts in the evidence must be resolved in favor of the prosecution,” and “[c]ircumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime.”<sup>29</sup> This Court will not interfere with the jury’s assessment of the weight and credibility of the evidence or the testimony of the witnesses.<sup>30</sup>

Sturgis’s argument is in large part directed at the intent elements of the charged offenses. Sturgis asserts that he “lacked the necessary intent to commit any of the charged offenses, and although, there was possession of the evidence the Prosecution presented at trial, this ‘possession’ was innocent, and not inculpatory of the charged offenses.” The element of intent may be inferred from the surrounding circumstances.<sup>31</sup> “Because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.”<sup>32</sup>

As noted above, a conviction for stalking or aggravated stalking requires the prosecutor to prove that the defendant engaged in “a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested . . . .”<sup>33</sup> “Harassment” is defined as “conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress.”<sup>34</sup> A conviction for unlawful posting of a message through the use of a computer requires the prosecutor to prove that the defendant “intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.”<sup>35</sup>

The evidence presented at trial supported an inference that Sturgis engaged in a campaign to humiliate the victim before her colleagues, to damage her reputation in the community, and to ruin her business prospects. His actions were directed at judges before whom the victim practiced and at community groups and associations with whom the victim was involved. Sturgis’s malicious intent was supported not only by circumstantial inferences drawn from his conduct, but also by Sergeant Timothy Willis’s testimony that Sturgis said something to the

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<sup>28</sup> *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (quotation marks and citations omitted).

<sup>29</sup> *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010) (internal quotation marks and citation omitted).

<sup>30</sup> *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

<sup>31</sup> *People v Kieronski*, 214 Mich App 222, 232; 542 NW2d 339 (1995).

<sup>32</sup> *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

<sup>33</sup> MCL 750.411h(1)(d); MCL 750.411i(1)(e).

<sup>34</sup> MCL 750.411h(1)(c); MCL 750.411i(1)(d).

<sup>35</sup> MCL 750.411s(1)(b).

effect that he would end the victim's existence in the political and professional fields. The prosecutor commented during Sturgis's cross-examination that Sturgis gave two thumbs up in reference to this testimony, and Sturgis replied that ending the victim's political and professional prospects was "exactly" what he was trying to do. Thus, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Sturgis's conduct was intended to cause the victim emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Sturgis additionally argues that the evidence was insufficient to support his convictions for stalking or aggravated stalking because the contacts would not cause a reasonable person emotional distress and were not willful. We find that the record evidence viewed in the light most favorable to the prosecution, demonstrates that this argument must fail.

## B. VALIDITY OF ARREST

Sturgis next argues that he was improperly prosecuted because the police lacked probable cause to arrest him. Sturgis's failure to challenge the validity of his arrest in the trial court renders this issue unpreserved and limits our review to plain error affecting Sturgis's substantial rights.<sup>36</sup> Probable cause to issue an arrest warrant may be based on factual allegations showing the commission of an offense and "reasonable cause to believe that the individual accused in the complaint committed that offense."<sup>37</sup>

Because Sturgis did not raise this issue below, the record lacks any factual development regarding the factual bases for the allegations in the warrant. Without the necessary factual development, there is no basis for concluding that the police lacked probable cause to arrest Sturgis. Accordingly, Sturgis's argument must fail.

## C. DOUBLE JEOPARDY

Sturgis next argues that his convictions all arose from the same course of conduct and violate the double jeopardy protection against multiple punishments for the same offense. We disagree.

The United States and Michigan Constitutions guarantee that a person will not be twice placed in jeopardy for the same offense.<sup>38</sup> The state and federal guarantees are substantially identical and should be similarly construed.<sup>39</sup> "Judicial examination of the scope of double jeopardy protection against imposed multiple punishments for the 'same offense' is confined to a

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<sup>36</sup> *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

<sup>37</sup> *People v Manning*, 243 Mich App 615, 621; 624 NW2d 746 (2000) (internal quotation marks omitted).

<sup>38</sup> US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

<sup>39</sup> *People v Davis*, 472 Mich 156, 161; 695 NW2d 45 (2005).

determination of legislative intent.”<sup>40</sup> In this context, the determination of “same offense” requires a court to “first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed.”<sup>41</sup> “Where the Legislature does clearly intend to impose such multiple punishments, imposition of such sentences does not violate the Constitution, regardless of whether the offenses share the same elements.”<sup>42</sup> If the Legislature has not “clearly expressed its intention to authorize multiple punishments,” the court should apply the “same elements” test prescribed in *Blockburger v United States*<sup>43</sup> “to determine whether multiple punishments are permitted.”<sup>44</sup>

The Legislature has expressly stated its intent to authorize multiple punishments where a defendant unlawfully uses a computer to post messages and that conduct violates another statutory provision.<sup>45</sup> Subsection (5) of the relevant statute provides that “[t]his section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate this section.” The Legislature has similarly expressed its intent to authorize multiple punishments where a defendant uses a computer to commit a crime and that conduct violates another provision of the law.<sup>46</sup> Subsection (2) of the relevant statute provides that “[t]his section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate this section, including the underlying offense.” Because the Legislature has clearly expressed its intent to authorize separate punishments for criminal conduct that violates the statutory prohibitions against unlawful posting of a message and using a computer to commit a crime, as well as other criminal conduct committed by a person when committing those crimes, Sturgis’s multiple convictions for unlawful posting of a message, using a computer to commit a crime, and stalking or aggravated stalking do not violate the double jeopardy protection against multiple punishments for the same offense.

Sturgis also argues that his dual convictions for stalking and aggravated stalking are not permitted because the offense of stalking “cannot lawfully be broken up into several separate charges to obtain multiple convictions.” The two stalking convictions, however, were based on

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<sup>40</sup> *People v Sturgis*, 427 Mich 392, 400; 397 NW2d 783 (1986).

<sup>41</sup> *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007).

<sup>42</sup> *Id.* (citation and internal quotation marks omitted).

<sup>43</sup> 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

<sup>44</sup> *Smith*, 478 Mich at 316.

<sup>45</sup> MCL 750.411s(5).

<sup>46</sup> MCL 752.796(2).

distinct acts of conduct.<sup>47</sup> Because the convictions arise out of “two distinct occurrences or episodes,” Sturgis’s separate convictions do not violate double jeopardy principles.<sup>48</sup>

#### D. THE PROSECUTOR’S CHARGING DISCRETION

Lastly, Sturgis argues that the prosecution violated its charging discretion by charging him with multiple offenses, which Sturgis maintains were not statutorily authorized, violated double jeopardy prohibitions, and lacked factual support. This unpreserved issue is reviewed for plain error affecting Sturgis’s substantial rights.<sup>49</sup>

A prosecutor has broad charging discretion to bring any charges supported by the evidence.<sup>50</sup> Judicial review of the prosecutor’s charging discretion “is limited to whether an abuse of power occurred, i.e., whether the charging decision was made for reasons that are unconstitutional, illegal, or ultra vires.”<sup>51</sup> Although Sturgis argues that the prosecutor gave the victim preferential treatment because of her status as an attorney despite knowing that she was lying, he has not supported his argument with any evidence, and he has not otherwise shown that he was charged for reasons that were unconstitutional, illegal, or ultra vires. As the charges were supported by the evidence and there was no violation of double jeopardy principles in charging Sturgis with the multiple crimes, this claim of error is rejected.

Affirmed.

/s/ William B. Murphy  
/s/ William C. Whitbeck  
/s/ Michael J. Talbot

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<sup>47</sup> The voice mail and two e-mail messages sent before the PPO was issued were the basis for the misdemeanor stalking conviction. The blogs sent after the PPO was issued were the basis for the aggravated stalking conviction.

<sup>48</sup> *White*, 212 Mich App at 306; see also *People v Lugo*, 214 Mich App 699, 708-709; 542 NW2d 921 (1995) (there is no violation of double jeopardy protections if one offense is completed before the other).

<sup>49</sup> *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011).

<sup>50</sup> *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004).

<sup>51</sup> *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999).